

2011.03.25 Hearing - Injunctive Relief 3/25/2011 8:54:00 AM

1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 ----- 5 ePLUS, INC., : 6 Plaintiff, : 7 v. : Civil Action 8 : No. 3:09CV620 9 LAWSON SOFTWARE, INC., : 10 : March 25, 2011 11 Defendant. : 12 ----- 13 DAILY COPY 14 15 COMPLETE TRANSCRIPT OF EVIDENTIARY HEARING 16 BEFORE THE HONORABLE ROBERT E. PAYNE 17 UNITED STATES DISTRICT JUDGE 18 19 APPEARANCES: 20 Scott L. Robertson, Esq. 21 Jennifer A. Albert, Esq. 22 Michael T. Strapp, Esq. 23 GOODWIN PROCTOR 24 901 New York Avenue, NW 25 Washington, D.C. 20001 26 27 Craig T. Merritt, Esq. 28 CHRISTIAN & BARTON 29 909 E. Main Street, Suite 1200 30 Richmond, VA 23219-3095 31 Counsel for the plaintiff ePlus 32 33 DIANE J. DAFFRON, RPR 34 OFFICIAL COURT REPORTER 35 UNITED STATES DISTRICT COURT 36 37	1	1 (The proceedings in this matter commenced at 2 9:30 a.m.) 3 4 THE CLERK: Civil Action No. 3:09CV620, 5 ePlus, Incorporated v. Lawson Software, Incorporated. 6 Mr. Scott L. Robertson, Mr. Craig T. Merritt, 7 Ms. Jennifer A. Albert, Mr. Michael G. Strapp 8 represent the plaintiff. Mr. Daniel W. McDonald, 9 Mr. Dabney J. Carr IV, Ms. Kirstin L. Stoll-DeBell, 10 Mr. William D. Schultz, and Ms. Rachel C. Huey 11 represent the defendant. 12 Are counsel ready to proceed? 13 MR. ROBERTSON: The plaintiff is, Your Honor. 14 MR. McDONALD: Lawson is as well, Your Honor. 15 THE COURT: All right. This is the 16 evidentiary hearing on the issue of an injunction. 17 Is there another firm coming into this case 18 for you-all? 19 MR. McDONALD: The Finnegan firm is involved, 20 Your Honor, but they are not going to be participating 21 in this hearing. They are going to be involved with 22 the appeal primarily, but they wanted to have access 23 to the documents. 24 THE COURT: Oh, okay. 25 Mr. Robertson.	3
1 APPEARANCES: (Continuing) 2 Daniel W. McDonald, Esq. 3 Kirstin L. Stoll-DeBell, Esq. 4 William D. Schultz, Esq. 5 MERCHANT & GOULD 6 3200 IDS Center 7 80 South Eighth Street 8 Minneapolis, MN 55402-2215 9 Dabney J. Carr, IV, Esq. 10 TROUTMAN SANDERS 11 Troutman Sanders Building 12 1001 Haxall Point 13 P.O. Box 1122 14 Richmond, VA 23218-1122 15 16 Counsel for the defendant Lawson. 17 18 19 20 21 22 23 24 25	2	1 MR. ROBERTSON: Good morning, Your Honor. 2 If I might, I just have a few brief opening 3 remarks to just sort of put some of the issues in 4 context and then preview for the Court or highlight 5 some of the topics that are going to be addressed 6 today by Mr. Farber's testimony, if that's 7 permissible. 8 THE COURT: All right. 9 MR. ROBERTSON: First, we are here to discuss 10 the supplemental evidence, testimony and documentation 11 that have been provided to the Court and exchanged by 12 the parties since the trial ended that we believe will 13 support the Court's discretion to grant an injunction 14 in this case to prevent the ongoing infringement of 15 ePlus' patents. 16 We certainly don't want to be here today, and 17 I know the Court doesn't want to retry the case, or 18 reargue a number of the issues involving hotly 19 contested issues that are before the Court. 20 That said, there will be some additional 21 details concerning evidence that did come out that we 22 think would be important for the Court to consider. 23 I'd just like to highlight Section 154 of the 24 Patent Act. Your Honor, the only right conferred upon 25 a patent owner under the Patent Statute is the right	4

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	<p>5</p> <p>1 to exclude. And that is the right that we are here to 2 enforce today as the Court knows.</p> <p>3 The Patent Act was what's called a carefully 4 crafted bargain by Congress which provided a limited 5 right to exclude for a period of years in exchange for 6 disclosure to the world of the invention.</p> <p>7 As you know, the eBay case has indicated and 8 confirmed that the Court has substantial discretion in 9 granting an injunction. And if we could just put up 10 the factors for the eBay test.</p> <p>11 This four-factor test, which has been called 12 the eBay factors, are, of course, as the Court 13 recognizes, the traditional factors for a court 14 entering injunctive relief.</p> <p>15 Irreparable injury and adequate remedy at law 16 have often been called the two sides of the same coin. 17 Balancing of the harms, of course, needs to be 18 considered as well as the public interest. But even 19 in the eBay case, an issue that arose was whether or 20 not a case called Continental Paper Bag, a 100-year 21 old decision, which had held that a patent owner, even 22 a non-practicing patent owner, had the right to 23 exclude an infringer from the marketplace.</p> <p>24 And the Court considered that case and 25 whether or not it actually had to reverse that</p>
	<p>6</p> <p>1 decision. And it found that it did not. And I think 2 there's some interesting wording in that case that I'd 3 like to bring to the Court's attention.</p> <p>4 It said from that right to exclude, the only 5 right granted to the patent owner, we may judge the 6 patent owner's remedies. Nothing less than an 7 injunction can retain that right of exclusivity 8 granted by the patent.</p> <p>9 As Justice Roberts noted in his concurrence 10 in the eBay case, citing Justice Holmes, a page of 11 history is worth a volume of logic. Infringement 12 having been found, the traditional remedy is to enter 13 the injunction.</p> <p>14 Those are my opening arguments.</p> <p>15 THE COURT: It's been interpreted to mean 16 there's a presumption of entitlement to injunctive 17 relief as opposed to an absolute entitlement to 18 injunctive relief; is that your point?</p> <p>19 MR. ROBERTSON: I think the issue is still 20 open as to whether or not the presumption still 21 applies. I think certainly in instances where there 22 has been established proven competition, 23 overwhelmingly courts have entered the injunctions in 24 favor of the patent owner, infringement having been 25 found.</p> <p>7</p> <p>1 But even competition itself, Your Honor, is 2 not critical to the injunctive relief we're seeking 3 here. We think the parties have focused significantly 4 in their posttrial submissions on this issue of 5 competition, and there will be a lot of discussion 6 about that today.</p> <p>7 But even the Federal Circuit post eBay has 8 said, for example, you're not required to prove actual 9 lost sales in order to obtain an injunction. You're 10 not even required to show that you have a commercial 11 product that's marketed in direct competition.</p> <p>12 Those cases I can cite to the Court are Eye 13 For Eye, Limited. The citation is 598 F.3d 831. It's 14 a 2010 case. And Broadcom v. Qualcomm, which is 543 15 F.3d 683. Obviously, we'll be citing those in our 16 posttrial brief, Your Honor. But, nevertheless, we 17 believe at the end of this hearing the evidence will 18 be overwhelming that there's direct competition in the 19 same marketplace, in the same market sectors, 20 involving Lawson and ePlus for these procurement 21 software solutions.</p> <p>22 So, first, I think it is important to 23 emphasize to the Court that ePlus does practice its own 24 patents. It's not what is known has an NPE, as it's 25 come up, or a non-practicing entity, or the more</p>

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<p>1        So when you drill down and really look at the  2    competition here, what's going to become clear is that  3    ePlus has not lost a single sale due to Lawson's RSS  4    or Punchout products. And that's a very, very  5    important issue on whether or not they would be  6    irreparably harmed in a way that cannot be compensated  7    by money.</p> <p>8        Is there a little bit of competition? There  9    might be literally one or two customers. I don't even  10   know if those are really competition. When you really  11   get down to it, it's a small number because it's the  12   people that are within that 2 percent that have the  13   Lawson ERP suite and now they're looking to add this  14   type of procurement functionality. So you're in a  15   subset of that 2 percent that even would be in that  16   ballpark. So it's very, very rare.</p> <p>17       The other key things here, that 2 percent  18   number is also significant in another way. Less than  19   2 percent of ePlus' business is this procurement  20   business, this Procure+ and Content+. They call them  21   their flagship products within this niche, but it's an  22   awfully small armada within that company. It's only  23   about \$6 million out of over \$800 million in sales.  24   Lately, it's been less than 1 percent of their sales.  25   So it's very small.</p>	17	<p>1        whether it was petitioned for cert or not.</p> <p>2        THE COURT: The issue is whether it's  3    pending. I don't know of anything being granted.</p> <p>4        MR. McDONALD: I think the time has passed  5    for that, Your Honor, just looking at the district  6    court decision back in 2006, but I'm not sure.</p> <p>7        THE COURT: Oh, yeah.</p> <p>8        MR. McDONALD: So on the harm issue, I'm not  9    clear what exactly ePlus is asking for in terms of a  10   scope of injunction. I didn't hear Mr. Robertson talk  11   about that in his opening remarks, but we have seen  12   some indication in their papers they're seeking an  13   injunction not just in going forward RSS and Punchout  14   sales by Lawson, which is one thing for customers that  15   aren't in the pipeline, etc., but they actually have  16   indicated that while they want to let our existing  17   customers continue to use RSS and Punchout -- Your  18   Honor asked that question to Mr. Robertson at one of  19   our hearings, I think, between trial and now, and he  20   said, oh, no, we're not seeking to stop the customers  21   from using it, but they are seeking to have Lawson  22   stop servicing those customers. And that would be  23   very harmful.</p> <p>24       Lawson's life would go on at some level for  25   Lawson, but we're really talking about there is a harm</p>	19
<p>1        So when you're looking at harm and the  2    injunction, there's really no harm to ePlus. With all  3    the other competitors out there, the different  4    products, whether or not Lawson is enjoined isn't  5    going to alleviate any harm to ePlus.</p> <p>6        THE COURT: Is it your view that I can impose  7    royalties going forward?</p> <p>8        MR. McDONALD: Yes.</p> <p>9        THE COURT: And I can hear evidence on that  10   now?</p> <p>11       MR. McDONALD: Yes.</p> <p>12       THE COURT: I don't need a jury?</p> <p>13       MR. McDONALD: That's correct.</p> <p>14       THE COURT: That's the Toyota case?</p> <p>15       MR. McDONALD: Right.</p> <p>16       THE COURT: Is that case on appeal?</p> <p>17       MR. McDONALD: That was the Federal Circuit.</p> <p>18       THE COURT: I know, but did it go up?</p> <p>19       MR. McDONALD: I believe it did.</p> <p>20       THE COURT: Has it been denied writ?</p> <p>21       MR. McDONALD: Did it go to the Supreme  22   Court, you mean?</p> <p>23       THE COURT: Yes.</p> <p>24       MR. McDONALD: I'm pretty confident the  25   Supreme Court hasn't accepted anything. I don't know</p>	18	<p>1        for the customers because they cannot use unsupported  2    software, especially industries like health care and  3    the public sector. We're talking about buying the  4    supplies for people's operations. And if they have an  5    unsupported system, they have a problem with it, it is  6    actually -- for example, Google makes a change to  7    their system. Well, if the product interfaces with  8    Google, there might be a little glitch or something.  9    The customer needs to pick up the phone and call  10   Lawson and fix that.</p> <p>11       It's like saying you can keep driving the  12   car, but you just can't put anymore gas in it because  13   the support is so critical to using these things.</p> <p>14       We're talking about people having operations. We're  15   talking about Virginia Commonwealth university, which  16   is a Lawson customer of RSS.</p> <p>17       If you enjoin Lawson from supporting them,  18   they don't have any other options. No other company  19   out there supports Lawson's systems. You have to have  20   a knowledge and understanding and access to the code  21   of the Lawson systems to be able to fix those types of  22   glitches and figure out how it interacts with the  23   other Lawson systems in that suite of products to  24   solve those problems.</p> <p>25       So you're talking about a very significant</p>	20

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	<p>1 harm. They can't simply just stop using our product  2 and switch to another one tomorrow. That takes  3 months, even years, to qualify the products to make  4 sure they work so they don't cause products with  5 supplying operations and things like that. It  6 literally takes years for a customer to switch to a  7 different product. So that would be a devastating  8 thing.</p> <p>9 And ePlus has nothing to gain from that.  10 They don't provide service to the Lawson customers.  11 We're talking about an injunction here that would  12 really just hurt customers without helping ePlus. The  13 right thing to do would be to just -- we would keep  14 track of our sales. Everybody can take their appeals.  15 The only way to make sure that nobody is  16 irreparably harms here is to deny an injunction,  17 because those customers, there's no way to compensate  18 them if they are lost from support and ePlus loses on  19 appeal. What recourse do they have at that point? So  20 that's the right thing to do here when you look at the  21 balance of the harms.  22 So that in a nutshell -- Mr. Hager is our  23 person. He's the VP from the S3 part of Lawson, which  24 has these RSS and Punchout products, very  25 knowledgeable about many aspects of the company</p>
	<p>21</p> <p>1 THE COURT: I didn't ask you that.  2 MR. ROBERTSON: I'm not going to ask for that  3 relief, Your Honor. We want --  4 THE COURT: Ever?  5 MR. ROBERTSON: Excuse me?  6 THE COURT: Are you ever going to come to me  7 and ask for that relief?  8 MR. ROBERTSON: This is what we want.  9 THE COURT: E-v-e-r, Mr. Robertson?  10 MR. ROBERTSON: I am not going to ask you for  11 that relief, Your Honor, because I want an injunction,  12 and once the injunction enters, if my client so  13 decides that it wants to determine to license Lawson,  14 that's when the playing field has been leveled.  15 In fact, Judge Ellis wrote a very thoughtful  16 decision on this very point saying that it is  17 difficult for courts who are ill-equipped to determine  18 what the appropriate licensing terms should be between  19 these two parties. The Court is not an expert in the  20 software industry, with all due respect. And as Judge  21 Ellis pointed out, once the injunction enters, it is  22 indeed the marketplace that sets the terms for the  23 license that could issue going forward.  24 In other words, Lawson would have to sit down  25 with ePlus and determine, based on marketplace</p> <p>22</p> <p>1 because he's held different jobs within S3. And he'll  2 help you understand the competitive landscape out  3 there, what we really sell, how it's sold, and also  4 this impact on customers if an injunction is entered.  5 Thank you.  6 Oh, we have a cite for the Federal Circuit  7 decision in Pace v. Toyota. It's 504 F.3d 1293.  8 That's from 2007. And somebody just checked that cert  9 was denied.  10 Thank you.  11 MR. ROBERTSON: If I might briefly respond.  12 THE COURT: I don't want you to do anything  13 except tell me one thing.  14 MR. ROBERTSON: Yes, sir.  15 THE COURT: If you are denied an injunction,  16 am I going to be facing a request for going forward  17 royalty?  18 MR. ROBERTSON: Sir --  19 THE COURT: Assume you're going to be denied  20 an injunction today after I hear the evidence and tell  21 you I don't think there's any reason for an  22 injunction, are you going to be asking for going  23 forward royalty?  24 MR. ROBERTSON: I think the Court has the  25 authority to do it.</p> <p>24</p> <p>1 factors, how valuable the technology is that is  2 infringing.  3 THE COURT: The answer is no, you're not  4 going to come to me for royalty going forward if the  5 injunction is denied?  6 MR. ROBERTSON: I suppose if the injunction  7 is denied and the Federal Circuit then upholds the  8 denial of the injunction, it would probably be  9 remanded for some relief because, as the Court knows,  10 the statute says a licensee, excuse me, I mean a  11 patent owner shall receive no less than a reasonable  12 royalty.  13 So I think they would remand indicating that  14 since there was no injunction granted, that there had  15 to be some relief afforded by the district court.  16 I wanted to point out something about the  17 Toyota v. Pace case if I could. It's a very unique  18 case. In fact, that's a case where the Court did  19 impose a compulsory license, but it turned on the fact  20 that the patent owner was an NPE, didn't have its own  21 product, wasn't out there competing in the  22 marketplace, didn't have a product covered by the  23 patents. And that is why and that was the only reason  24 why.  25 THE COURT: Tell the record what an NPE is.</p>

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<p>1 MR. ROBERTSON: That's the non-practicing 2 entity, sometimes referred to, as mentioned before, 3 the patent troll. 4 THE COURT: What if I decided that the public 5 interest here requires a compulsory license because 6 when one of my colleagues goes to the Medical College 7 of Virginia for open heart surgery, I can't be putting 8 him or any other member of the public, colleague or 9 not, Mr. Merritt, Mr. Carr, or anybody in his firm, 10 anybody in the Richmond area, at risk of losing a 11 stitch or two, or not having the right syringe, or not 12 having the right product. So instead of an 13 injunction, I say you're entitled to a remedy, and 14 under the circumstances an injunction is not the right 15 one, but a compulsory license is. 16 At that juncture I'd have to find out what 17 the license is or rate is, wouldn't I? 18 MR. ROBERTSON: You would probably need to 19 make findings of fact with respect to what a 20 reasonable royalty would be. 21 THE COURT: How would I do that on the record 22 that would be before me at the conclusion of these 23 proceedings? 24 MR. ROBERTSON: I think it would be very 25 difficult, Your Honor.</p>	<p>25</p> <p>1 because they did not involve the same technology or 2 they were not really arms' length negotiated 3 comparable licenses. 4 So I think it's going to be very difficult 5 for the Court to try and come up with a royalty rate 6 given the sort of absence of examples out there for 7 the Court to draw upon. 8 Lawson has offered in its own self-serving 9 way. It wants to dictate what the terms of the 10 licensing are. 11 THE COURT: They said what? 12 MR. ROBERTSON: They said first it should 13 only be on the revenues they generate from licensing 14 fees. Why is that? Because it's a very small portion 15 of revenues they generate from -- 16 THE COURT: Mr. McDonald can't argue that 17 anymore after what he just argued about the critical 18 nature of the service aspect of their business. He 19 just said that's the integral link, the thing that 20 keeps things going, the thing that creates such a 21 significant interest in the public that an injunction 22 couldn't possibly lie. 23 And if that's the effect of it there, 24 certainly it has another effect in the dollar arena, 25 doesn't it?</p> <p>26</p> <p>1 THE COURT: It would be somewhat difficult 2 unless one accepts Ouija work, dart boards, and those 3 kinds of things as the bases for deciding evidence. 4 MR. ROBERTSON: One of the things that the 5 Court suggested earlier was that we should be looking 6 at comparable licenses. Of course, we did that when 7 we went out in preparing our damages model for the 8 Court, and we didn't find comparable licenses. 9 The Federal Circuit has been very particular 10 in what it has determined to be comparable licenses in 11 the same technology. I don't want to relive that, the 12 argument with respect to ResQNet, but one of the 13 reasons they say to look to the settlement agreements 14 was they were the most pertinent because they 15 addressed the very patents that were at issue in the 16 case. 17 I looked at some of the other comparable 18 licensing. In fact, it involved some of my clients, 19 licenses I knew that the clients had never received a 20 penny in royalties under, notwithstanding what the 21 terms were. I looked at the technology that was 22 identified. 23 So we had a handful, maybe five, that we 24 thought were comparable or could be considered 25 comparable and determined that they all were not</p>	27
	<p>1 MR. ROBERTSON: Certainly, Your Honor, I 2 think Mr. McDonald has overstated the harm. 3 THE COURT: He's bound by it now having 4 stated it. 5 MR. ROBERTSON: First let me say, as a matter 6 of law, Your Honor, let me cite this case to you. 7 It's Acumed v. Stryker Corporation. It's 551 F.3d 8 1323. It's a 2008 case. It says, in considering the 9 balance of the hardships in an injunction 10 determination, you only consider the hardships between 11 the patent owner and the infringer. The effect on a 12 customer's -- and in this case, it was a medical case 13 -- patients is irrelevant under this prong. 14 There have been a number of cases actually 15 involving medical devices where injunctions have 16 entered. 17 THE COURT: Is that before or after eBay? 18 MR. ROBERTSON: It's a 2008 case. 19 THE COURT: I have to read that case because 20 it sounds to me like -- I think I've looked at it, but 21 I think it's rather remarkable to say that you don't 22 pay any attention to the public interest. Here you're 23 not talking about the customers, you're talking about 24 the patients in the hospital who aren't the customers 25 at all.</p>	28